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MAILED

JUL 30 2010

In re Application of :
Taleyarkhan et al. :
Application No. 10/692,755 :
Filed: October 27, 2003 :
Attorney Docket No. 9750-1 :
: : :
OFFICE OF PETITIONS
ON PETITION

This is a decision on the renewed petition, filed January 28, 2010, which is being treated as a petition under 37 CFR 1.8(b), requesting withdrawal of the holding of abandonment in the above-identified application.

The petition is **DISMISSED**.

This application was held abandoned for failure to timely respond to the Notification of Non-Compliant Appeal Brief (37 CFR 41.37) of April 1, 2009, which set a one (1) month shortened statutory period for reply. Accordingly, a reply was due on or before May 1, 2009. A Notice of Abandonment was mailed November 2, 2009.

Petitioner states that a timely reply was received by the USPTO on April 13, 2009, specifically an Amendment to Appeal Brief. Petitioner has submitted a copy of the previously mailed correspondence, along with a copy of the Certified Mail Return Receipt, with the previous petition on November 7, 2009.

The file record does not include the originally submitted papers. Applicants may establish that a reply was filed with a postcard receipt that properly identifies the reply and provides *prima facie* evidence that the reply was timely filed. See MPEP § 503. For example, if the application has been held abandoned for failure to file a reply to a first Office action, and applicant has a postcard receipt showing that an amendment was timely filed in response to the Office action, then the holding of abandonment should be withdrawn upon the filing of a petition to withdraw the holding of abandonment. When the reply is shown to have been timely filed based on a postcard receipt, the reply must be entered into PALM using the date of receipt of the reply as shown on the post card receipt.

Where a certificate of mailing under 37 CFR 1.8, but not a postcard receipt, is relied upon in a petition to withdraw the holding of abandonment, see 37 CFR 1.8(b) and MPEP § 512. As stated in 37 CFR 1.8(b)(3) the statement that attests to the previous timely mailing or transmission of the correspondence must be on a personal knowledge basis, or to the satisfaction of the Director of the USPTO. If the statement attesting to the previous timely mailing is not made by the person who signed the Certificate of Mailing (i.e., there is no personal knowledge basis), then the statement attesting to the previous timely mailing should include evidence that supports the conclusion that the correspondence was actually mailed (e.g., copies of a mailing log establishing that correspondence was mailed for that application). When the correspondence is shown to have been timely filed based on a certificate of mailing, the correspondence is entered into PALM with the actual date of receipt (i.e., the date that the duplicate copy of the papers was filed with the statement under 37 CFR 1.8). It is important that the return postcard itemize all of the components of the application. If the postcard does not itemize each of the components of the application, it will not serve as evidence that any component which was not itemized was received by the United States Patent and Trademark Office (USPTO).

The Certified Mail Return Receipt submitted with the previous petition does not itemize all of the components that were submitted, rendering it impossible to know what was received by the USPTO. It merely shows that something was sent to the Board of Appeals. Therefore, as stated previously and above, it will not serve as evidence that the Amendment to Appeal Brief, specifically, was received by the USPTO. Further, the duplicate response filed concurrently with the instant petition does not contain a Certificate of Mailing. A Certificate of Mailing must be placed on each document for it to be proper.

Petitioner states that the weight of the document, 1lb. 2 oz., received on April 13, 2010 is *prima facie* evidence that it was the Amendment to the Appeal Brief, as the document was 77 pages. However, the weight of the package is neither documented by the USPTO nor relevant. The weight of a package is never a determining factor when reviewing a petition under 37 CFR 1.181. There are procedures and rules in place to safeguard an applicant from lost packages – the Certificate of Mailing system or Express Mail under 37 CFR 1.10. Petitioner did not use either of those processes. Accordingly, the petition under 37 CFR 1.181 is hereby dismissed.

ALTERNATIVE VENUE

Petitioner is strongly encouraged to consider filing a petition under 37 CFR 1.137(b) to revive an unintentionally abandoned application instead of filing a renewed petition under 37 CFR 1.181 or a petition under 37 CFR 1.137(a).

A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by:

(1) The reply required to the outstanding Office action or notice, unless previously filed. In nonprovisional utility application abandoned for failure to respond to a non-final Office action, the required reply may be met by filing either (A) an argument or amendment under 37 CFR 1.111 or (B) a continuing application under 37 CFR 1.53(b).

(2) The petition fee as set forth in 37 CFR 1.17(m), **\$810.00 for a small entity;**

(3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition was unintentional. The Director may require additional information where there is a question whether the delay was unintentional.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITIONS
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By fax: (571) 273-8300
ATTN: Office of Petitions

Any questions concerning this matter may be directed to the undersigned at (571) 272-3206.

Riana Walsh

Liana Walsh
Petitions Examiner
Office of Petitions